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Nos. 80-630 and 80-770

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARVIN GARBER, PETITIONER

v.

UNITED STATES OF AMERICA

NICHOLAS DENUCCI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the stolen property was part of a foreign freight shipment.

2. Whether a videotape illustration of the manner in which the crime might have been committed was properly admitted.

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3. Whether petitioner Garber was coerced into consenting to a search of his automobile (No. 80–630 only).

4. Whether an omission in the affidavit supporting a warrant to search petitioner Garber's house invalidated the warrant (No. 80–630 only).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A28) is reported at 626 F.2d 1144. The memorandum and order of ~~that~~ district court denying petitioners' motions for a new trial and for arrest of judgment (Pet. App. A29–A33) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1980, and a petition for rehearing was denied on August 18, 1980 (80–630 Pet. 1). The petition for a writ of certiorari in No. 80–630 was filed on October 17, 1980; the petition in No. 80–770 was docketed on November 13, 1980, back-dated to October 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted of stealing property that was part of a foreign freight shipment in violation of 18 U.S.C. 659, unlawfully possessing property stolen from such a shipment in violation of the same statute, unlawfully removing property from customs custody and control in violation of 18 U.S.C. 549, and conspiring to violate the foregoing statutes in violation of 18 U.S.C. 371. They were ordered to make restitution, and sentenced to concurrent one-year terms of imprisonment on the three substantive counts, to be followed by a five-year probation term on the conspiracy count. The court of appeals affirmed the convictions on the theft and conspiracy counts, but reversed those on the unlawful

possession and customs counts (Pet. App. A3, A24-A25).[1]

As set forth in the opinion of the court of appeals (Pet. App. A2-A4), the evidence showed that petitioners, who were police officers, stole a number of copper cathodes from a pier in Philadelphia during the last week of March 1978. While petitioners were on duty that week, they drove their patrol cars on to the pier on several nights and parked next to the area where the cathodes were stored. Each night they stayed at the pier approximately 30 minutes. Traces of copper were later found in their patrol cars, on a pair of work gloves found in the trunk of petitioner Garber's car, and on their police uniforms.

The cathodes, which were large sheets of copper weighing about 300 pounds (Pet. App. A3 n.1), were part of a shipment sent from Chile in February 1978 to a buyer in Bridgeport, Connecticut. Because of labor difficulties, the carrier diverted the shipment to Philadelphia, as it was privileged to do under the bills of lading. The vendor of the cathodes found that freight costs from Philadelphia to Connecticut made transshipment to Bridgeport impracticable, and the cathodes were therefore being held at the Philadelphia pier while the vendor searched for another buyer.

ARGUMENT

1. Petitioners contend that the cathodes were no longer in foreign commerce when they were stolen. The court of appeals analyzed a number of cases dealing with the question of when goods cease to constitute "an interstate or foreign shipment of freight," protected by 18 U.S.C. 659, and concluded that the copper cathodes still constituted a foreign shipment when

[1] "Pet. App." refers to the appendix to the petition in No. 80-770.

they were stolen (Pet. App. A4–A15).[2] We submit that this conclusion is correct, for the reasons stated by the court of appeals. In any event, there is no occasion for this Court to afford further review to this fact-bound question. As the court of appeals noted (Pet. App. A5), "the test *** is a practical one based on common sense and administered on an ad hoc basis" after evaluating the particular facts of each case. Petitioner Garber agrees (Pet. 6), but argues that the court of appeals did not accord sufficient weight to the facts that the cathodes remained at the pier for a substantial time, and that at the time of the theft their ultimate destination beyond Philadelphia had not been identified. This dispute over the application of the statute to the unique facts of this case does not warrant review by this Court.

2. Petitioners also object to the admission of a videotape demonstrating that two men could put a cathode into the trunk of a police car. The government presented eyewitness testimony placing petitioners at the scene of the thefts, together with evidence that traces of copper were found on their uniforms and in the trunks of their patrol cars. There were, however, no eyewitnesses to the actual perpetration of the thefts, and no cathodes were found or seen in either petitioner's possession or control. Because the cathodes were large and heavy (Pet. App. A3 n.1), it

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[2] Section 659 provides in pertinent part:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains * * * from any steamboat, vessel, or wharf, * * * with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property; * * *
>
> * * * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.

was important to show that they would fit into the trunk of a patrol car and could be placed there by two men. In order to establish these facts, the government introduced a videotape of a demonstration in which two police officers placed a copper cathode from those remaining at the pier into the trunk of a police patrol car similar to the ones assigned to petitioners.[3] In the demonstration, pieces of wood obtained from a pile near the warehouse where the cathodes were stored (A. 243a) were placed in the trunk of the vehicle and the cathode was slid into the trunk on top of the wood (A. 241a).

In its charge, the court instructed the jury to acquit the defendants unless satisfied beyond a reasonable doubt that it was possible for the cathodes to be placed in the trunk of petitioners' patrol cars; the court noted that the videotape "purported to show" that two men could carry a cathode and load it into a car "which purported to be" similar to petitioners' cars (A. 279a-280a). The court continued (A. 280a):

> Now, of course, no one suggested the videotape you saw pictured Marvin Garber and Nicholas DeNucci taking copper cathodes, and I'm sure you didn't understand that that was the purpose of the videotape. What the videotape was designed to show was how the crime might have been committed or what may have taken place. In other words, this was not a picture of what did take place but merely was a representation or an illustration of what could have occurred or how the defendants might have gotten the copper cathodes into the trunk of their police vehicles.

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[3] The patrol car used for the demonstration was a 1976 Plymouth Grand Fury (A. 231a); the patrol cars assigned to petitioners were 1976 and 1977 Plymouth Grand Furys (A. 232a). The dimensions of the trunks of the three cars were the same (A. 503a).

Petitioners contend (80-630 Pet. 8-12; 80-770 Pet. 7-8) that the demonstration did not accurately reflect the conditions at the time of the theft, that presenting the demonstration by videotape gave it undue emphasis, and that it was unnecessary because other evidence "tended to substantiate" (80-630 Pet. 10) the feasibility of loading the cathodes into the car trunks.[4] Several of the alleged factual differences between the demonstration and the theft are refuted by the record;[5] others were clearly evident to the jury.[6] In any event, those differences were simply matters for counsel to argue to the jury in disputing the value of the demonstration. Petitioners do not substantiate their

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[4] Petitioner Garber gives no record reference to support his assertion that he "objected to the introduction of this film for a variety of diverse reasons" (80-630 Pet. 8). The record as set forth in the Appendix in the court of appeals shows only that, when the government first moved the introduction of the videotape, the attorney representing both petitioners responded: "Well, I obviously object; but at the very least I should be able to cross-examine Mr. Cunningham before the jury views it" (A. 233a). After cross, redirect and recross examination, the government asked permission to show the videotape to the jury, which was granted without further objection from the defense (A. 239a). After further redirect, recross and redirect examination subsequent to the showing of the videotape, the government moved the admission of it and other exhibits (A. 243a); no defense objection to admission is shown.

[5] Although petitioners state (80-630 Pet. 8; 80-770 Pet. 7) that the government "built a frame platform" to hold the cathode in the demonstration car, the evidence showed that the "platform" consisted of approximately five pieces of wood picked up nearby and laid in the trunk (A.241a-243a). Similarly, although the petitioners' patrol cars were not used (80-630 Pet. 9; 80-770 Pet. 7), the demonstration car was the same year and model as one of those cars (A. 231a-232a), and the trunk dimensions on all three cars were the same (A. 503a).

[6] For example, the demonstration was taped during the day, while the theft occurred at night (80-630 Pet. 9; 80-770 Pet. 7).

claims that the use of the videotape unfairly emphasized the demonstration, nor do they identify the other evidence that made its use unnecessary. In any event, the court's instruction to the jury explained that the demonstration was offered solely to show that it was possible for two men to place the cathodes in a trunk of a car that "purported" (A. 280a) to be similar to petitioners', but that the weight to be given to the exhibits was for the jury to determine (A. 274a).

3. Petitioner Garber claims that two unlawful searches led to evidence that was used against him. First, he argues that his consent to the warrantless search of the trunk of his personal automobile—which led to the seizure of work gloves bearing traces of copper—was coerced. Second, he contends that the warrant-authorized search of his house, which led to the seizure of his uniform (also bearing traces of copper), was unlawful because his house had been searched the previous day pursuant to an identical warrant based upon an identical affidavit, and the magistrate who issued the second warrant was not informed of the issuance and execution of the first warrant. Neither claim has merit.

a. Gerber contends that he was coerced into consenting to the search of his automobile because he faced dismissal from the police force if he refused to cooperate in the investigation, and because he did not know that he faced criminal prosecution (Pet. 13–16). Garber was told, however, that he was under investigation for the theft of some copper (H. Tr. 337, 605). As he was a police officer, he could scarcely have been unaware of the possibility of criminal prosecution for such a theft. The district court specifically found that he was not "subjected to any trickery, coercion, duress or threat to obtain his consent" and that there was "no excessive display of police force or authority which in any way either motivated or caused [petitioner] to give

his consent" (H. Tr. 722; A. 103a). Compare *Garrity* v. *New Jersey*, 385 U.S. 493, 494–495, 499–500 (1967); *Gardner* v. *Broderick*, 392 U.S. 273, 278 (1968). This finding is supported by the record. Petitioner was specifically told that he was under no obligation to consent to the search (H. Tr. 402, 421). Furthermore, he was never ordered to cooperate with the investigation (H. Tr. 338–339), and the local ordinance was never invoked (H. Tr. 430).[7]

Petitioner's further suggestion (80–630 Pet. 14) that the "implied threat to obtain a warrant" if he did not consent to the search vitiated his consent is also without merit. In contrast to *United States* v. *Molt*, 589 F.2d 1247 (3d Cir. 1978), upon which petitioner relies, the investigating authorities here had ample probable cause upon which to obtain a warrant;[8] copper traces had already been found in the trunk of his patrol car (H. Tr. 411).[9] Petitioner was simply presented with the option of consenting to an immediate search or waiting until a warrant had been obtained. His deci-

[7]The failure of the investigating officers to rely on the ordinance (Philadelphia City Charter §10–110, reproduced at 80–630 Pet. 3) when requesting petitioner's consent to the search is significant, because in terms the ordinance requires testimonial cooperation only, and thus may well not apply to the search situation. At least in the absence of express reliance on this authority by the investigating officers, the ambiguity of the ordinance significantly diminishes its potential coercive effect.

[8]*United States* v. *Scott*, 590 F.2d 531, 534 (3d Cir. 1979), upon which he also relies, is likewise inapposite. In that case, the district court had made no clear finding concerning the voluntariness of the consent, and the case was remanded for that purpose. Here, the district court's finding was unequivocal (H. Tr. 721–722).

[9]The existence of probable cause here is demonstrated by the fact that a warrant did actually issue authorizing the search of petitioner's police locker on the basis of information known to the investigating officers when they sought petitioner's consent to the search of his car (A. 331a–332a).

sion to permit the immediate search was not coerced merely because he knew of the alternative.[10]

b. The seizure of petitioner Garber's uniform from his house was also proper. Acting pursuant to a warrant (A. 328a–329a) that he concedes was valid (80–630 Pet. 16), police searched petitioner's house on March 30, 1978, for copper sheeting and for tools and clothing containing copper residue. No copper sheeting or tools were found; while the officers executing the search did find petitioner's uniforms, they saw no copper residue on them and hence did not take them (H. Tr. 527, 532). The next day, another officer was directed to return to the house for the uniforms, so that they could be sent to the police laboratory and examined for copper particles (H. Tr. 526, 532, 553). This officer thereupon procured a new warrant (A. 336a–337a), using in his affidavit essentially the same information that had been used in the affidavit supporting the first warrant (H. Tr. 539, 544); like the first warrant, the second one authorized a search for copper sheeting, tools and clothing containing copper residue. In executing the warrant, the officer asked petitioner to give him all of the police clothing that was present in the house; petitioner's wife and the officer removed the clothing from the closet (H. Tr. 550–551). The officer and his associates also searched the house briefly for the copper sheets and tools (H. Tr. 547–550).

Petitioner Garber argues (Pet. 17) that the failure to state in the affidavit supporting the second warrant that a prior warrant had been issued and executed renders the second warrant invalid. We note at the

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[10]The subsequent decision to return the work gloves to the car and obtain a warrant before actually seizing them (H. Tr. 477–478) suggests only that the investigating officers wished to avoid any possible challenges to the search; it does not render petitioner's consent any less voluntary.

outset that, assuming *arguendo* that the warrant was invalid and that the evidence concerning the copper traces found on petitioner's clothes should therefore have been suppressed, any error in admitting it was harmless. In light of the properly admitted evidence that copper traces were found in the police car assigned to petitioner and on the work gloves recovered from his own car, the cumulative evidence that there were also copper traces on his uniform did not provide significant additional proof of his association with the stolen copper cathodes.

In any event, the warrant authorizing that search was valid. In order to succeed in an attack upon the facially sufficient warrant application, petitioner is required by *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978), to show two things: First, that any misstatement or omission was the product of deliberate falsehood or reckless disregard for the truth, and not the result of negligence or innocent mistake; and second, that after correcting the misstatement or supplying the omitted information, the search warrant affidavit fails to establish probable cause. Petitioner can make neither showing.

The district court specifically found (H. Tr. 723) that the warrant "was not obtained through any deliberate misrepresentation, misleading or anything else that would warrant the suppression" of the evidence. This Court has no occasion to undertake to review that finding. In addition, while it would clearly have been preferable for the investigating officers to have explained in the second warrant that they had conducted an earlier and fruitless search, a full explanation of the circumstances would not have made issuance of the warrant for a second search inappropriate. The officers had subsequently determined that traces of copper on the uniforms not visible to the naked eye could be recovered in the laboratory, and they accordingly sought

the new warrant to authorize the seizure of those uniforms. The omission here was not only of the fact of the prior search, which standing alone might indeed have undermined probable cause for a second search, but also of the reason why the first search was now believed to have been insufficient. This is accordingly not a case in which full disclosure of the facts known to the affiant would negate the existance of probable cause or the reasonableness of the proposed search, and there is no need for this Court to consider what the appropriate remedy would be in that situation for willful, reckless, or even negligent failure to disclose.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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